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No. 468

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*In the Supreme Court of the United States*

OCTOBER TERM, 1942

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ALEX. RANIERI PETITIONER

vs.  
THE UNITED STATES

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ON PETITION FOR WRIT OF HABEAS CORPUS TO THE COURT  
OF CLAIMS

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

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No. 463

ALEX RANIERI, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The opinion of the Court of Claims (R. 38-42) is not yet officially reported.

## JURISDICTION

The judgment of the Court of Claims was entered February 2, 1942 (R. 42). A motion for a new trial was overruled June 1, 1942 (R. 43). On June 29, 1942, the time within which to file the petition for writ of certiorari was extended by order of the Chief Justice to October 29, 1942 (R. 57). The petition for writ of certiorari was filed October 17, 1942 (R. 58). The jurisdiction of this Court was invoked under Section 3(b) of

the Act of February 13, 1925, as amended by the Act of May 22, 1939.

#### QUESTIONS PRESENTED

1. Whether there is lack of substantial evidence to sustain certain findings of fact made by the Court of Claims; whether ultimate findings of fact of the court are inconsistent with the evidentiary or primary findings; and whether the court failed to make findings of fact on the material issues.

2. Whether, under a contract calling for the construction of a levee by petitioner, the United States undertook to furnish petitioner clean earth, free from all foreign matter which would not slough or show a tendency to do so and be of the best grade, or whether it merely agreed to make earth available out of which petitioner was required to select the proper type for the construction of the levee.

3. Whether the United States made any material misrepresentation as to the character of earth available or as to the subsoil conditions which existed in the borrow pits from which petitioner was required to take the soil with which to construct the levee.

#### STATEMENT OF FACTS

This case involves a suit by petitioner against the United States for the recovery of \$258,880.49 claimed to be due on account of construction work

(R. 1-8). The United States filed a special answer denying the sum was due (R. 8-12) and a counterclaim for \$37,653.20 (R. 12-15).

The facts as found by the Court of Claims (R. 30-38) and as shown by the evidence may be summarized as follows:

Petitioner and the United States entered into a contract dated October 12, 1931, whereby for a consideration of 12.4 cents per cubic yard petitioner agreed to "furnish all labor and materials, and perform all work required for the construction of Item R 831, Chamberlain-Lobdell Levee, Lots A, B, C, and D, containing approximately two million nine hundred and fifty thousand (2,950,000) yards, situated in the Atchafalaya Front Levee District," in accordance with specifications, schedules, and drawings, all made part of the contract (R. 30-31). The levee to be constructed extended for a distance of about 22,000 feet (R. 31). The contract provided that work was to be commenced on each of the four lots within twenty calendar days after the date of receipt of notice to proceed and was to be completed within 450 calendar days from the date of receipt of such notice (R. 31). On October 30, 1931, petitioner received notice to proceed, thereby fixing the completion date as January 22, 1933 (R. 32). Within the contract time petitioner commenced the preliminary work of clearing, grubbing, and plowing which required about one week's time



(R. 32). He commenced the placing of material in the levee on lots A, B, C, and D, 103, 228, 298, 366 days, respectively, after the receipt of notice to proceed (R. 32).

Under Section 13 of the specifications the Government agreed to furnish the right-of-way and earth for the construction of the levee without cost to the contractor (R. 16-17) and under Article 39 of the specifications the material for the work was to be obtained from riverside borrow pits and from the existing levee to the extent indicated in the drawings which the court below found to be 2,000 linear feet (R. 31). Paragraph 19 of the specifications (R. 17) stated that the soil conditions indicated that a B section was required throughout.<sup>1</sup> There was sufficient satisfactory material in the borrow pits and in the available sections of the old levee from which to construct a B section (R. 50, 51, 52, 55), and the new levee was eventually successfully constructed from these sources (R. 31-32; 52).

Borings had been taken over the site of the proposed levee at intervals of 1,000 feet each to a depth of about 25 feet and a chart of these borings appeared on the contract map (R. 31). The chart classified the earth disclosed by the borings as sandy loam, sandy clay, sand and loam, clay, loam,

<sup>1</sup> A B section was described as having "a crown of 10 feet, a riverside slope of 1 on  $3\frac{1}{2}$ , the landside slope as containing a seepage line of 1 on  $6\frac{1}{2}$ , and the governing material as loam" (R. 31).

sand and silt, clay and silt, brown clay, soft brown clay and sand, soft blue clay, hard blue clay, and soft brown clay (R. 31; 55). There was no evidence to show that the borings were inaccurately charted (R. 32).<sup>2</sup> Prior to the submission of petitioner's bid he had been furnished the contract map and specifications and his representatives visited and inspected the site of the proposed levee (R. 31; 46, 48).

The petitioner had no experience in building levees (R. 31). In the course of the work, Government inspectors served 231 notices upon petitioner of his departures from contract requirements, including the overdigging of borrow pits, impounding water between partial fills, placing wet materials and materials showing a tendency to slough on the embankment, improper preparation of foundations, leaving the foundation base wet, and digging inspection ditches to excess of width and depths (R. 32; 52). The contracting officer on numerous occasions called petitioner's attention to the harmful practices of like character in which he was engaging (R. 33-34), directed him to correct these practices, and advised him that he would be held responsible for resulting damage to the levee (R. 34-36).

On September 15, 1932, the contracting officer notified petitioner in writing that the progress of

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<sup>2</sup> The evidence conclusively established that the material actually encountered corresponded closely to that disclosed by the borings (R. 55).

the work was unsatisfactory and demanded the use of additional equipment. On October 14, 1932, he repeated these demands, pointing out the harmful practices in which petitioner was engaged, and advising petitioner the embankment already installed was not considered entirely satisfactory for completion and that no further partial payments would be made for incomplete embankments on Lots A and B (R. 34-35). At no time did petitioner appeal from the decision of the contracting officer to the Secretary of War (R. 36). On December 12, 1932, petitioner ceased work on the project and by letter advised the contracting officer that it elected to rescind the contract, contending that subsurface or latent conditions at the site differed materially from those represented in the plans and specifications (R. 36). On that date petitioner had completed about 45 percent of the required work and had exhausted about 91 percent of the contract time (R. 37). The contracting officer replied on December 14, 1932, denying the right of petitioner to rescind the contract and demanding resumption of operations (R. 36). Operations were not resumed and the contracting officer, on January 3, 1933, terminated the petitioner's right to proceed under Article 9 of the contract (R. 36-37). The work remaining to be done was relet by advertisement to other contractors who successfully completed the work at an excess cost to the government of

\$108,995.71 (R. 37-38). At the time petitioner abandoned work there was retained the sum of \$71,342.51 making the net excess cost to the United States of completing the levee \$37,653.20 (R. 38).

The Court of Claims made an ultimate finding that plaintiff could have satisfactorily completed the work in the agreed time with the material available and that his failure to do so was due to his own fault and negligence, to delay on his part in getting started in the actual handling of levee material, to his violation of the terms of the contract, and to unsound practices in the handling of material (R. 37).

After making the foregoing findings of fact the court directed that the petition be dismissed and entered judgment for the United States on its counterclaim in the sum of \$37,653.20 (R. 42). Petitioner's motion for a new trial was overruled (R. 43).

#### ARGUMENT

Petitioner contends that the court below made findings of fact which were not supported by evidence, that evidentiary findings of fact are inconsistent with its ultimate findings of fact, and that it failed to make findings of fact in respect of material issues. Petitioner also contends that under the terms of the contract and specifications the United States undertook to furnish him clean earth, free of all foreign matters, which would not

slough or show a tendency to slough and would be of the best grade. Finally, he contends that the Government misrepresented the working conditions which would be encountered at the site of the construction of the levee. We submit that these contentions raise no substantial issue and are without merit.

1. The finding that sufficient satisfactory soil was available for the construction of the levee was correct. The evidence disclosed that there was suitable material with which to construct a B section levee of which the governing material is loam (R. 55). The uncontradicted testimony of the government expert discloses that loam is a mixture of earth containing less than 30 percent of clay particles and less than 80 percent of sand particles (R. 55). Clearly there was enough clay and sand available to furnish suitable material for this type of construction<sup>3</sup> (R. 55). Moreover a subsequent contractor was able to complete the building of the levee (R. 51); the levees adjoining at both ends the one here in controversy were completed within the contract time and without difficulty (R. 52); and witnesses testified that the work could have been performed within contract time (R. 50, 52).

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<sup>3</sup> The presence of a large amount of clay (buckshot) would permit the construction of a B section since buckshot is suitable even for the construction of an A section, the sidewalls of which have a sharper angle than a B section (Specification 19, R. 17; 50).

Petitioner also contends that it was entitled to a finding that all the material supplied was wet and showed a tendency to slough. The record, however, discloses that this condition of the material was brought about by the faulty methods of construction employed by petitioner (R. 34-35, 53). Any type of soil if allowed to become sufficiently impregnated with water will become wet and if improperly handled it will show a tendency to slough (R. 52-53). Rains and seepage were common occurrences in the part of the country where petitioner undertook to construct the levee. It was his duty to provide adequate drainage to minimize the water content and to handle his material in such a manner as to reduce the possibility of sloughing to a minimum (R. 34-35, 52-53). This he did not do. The fact that other contractors completed their work out of the material at hand (R. 51, 52) and that the expert witnesses testified that the work could be completed with the material available (R. 50, 52) warranted the court below in refusing to make the finding to which petitioner claims he is entitled.

The evidentiary facts found by the court below are not inconsistent with its ultimate findings in respect of the character of the earth. The evidentiary findings were to the effect that the petitioner unnecessarily permitted material to become wet and placed wet soil and soil which had a tendency to slough in the levee (R. 32-35). Such find-

ings, however, relate to the manner in which petitioner performed his work. They plainly are not inconsistent with the ultimate findings that there was material which was satisfactory (R. 37).

Petitioner was not therefore entitled to his requested findings,<sup>4</sup> and the findings of the court below to which he excepts are all supported by adequate evidence.<sup>5</sup>

2. Petitioner erroneously contends that the United States agreed to furnish him with earth for the construction of the levee which should be "clean earth, free from all foreign matter, which would not slough or show a tendency to do so and be of the best grade." The United States undertook, by Paragraph 13 of the specifications, only to furnish without cost to the contractor the right-of-way and earth for constructing the levee (R. 16-17). Article 7 of the contract provides that all workmanship, equipment, materials, and ar-

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<sup>4</sup> If it were material petitioner might have been entitled to a finding that he encountered cypress stumps in the borrow pits. Such a finding, however, would necessarily have to be coupled with a further finding that the presence of cypress stumps in borrow pits was common occurrence (R. 50, 53) which should have been expected and that their presence was not such as to interfere with the successful conclusion of the work (R. 53). Accordingly, the failure of the court to make a finding in this respect is immaterial since the conclusion cannot be affected by it.

<sup>5</sup> In the statement of facts, *supra*, record references to the evidence which supports the findings of the court below are given in addition to the record references of the findings themselves.

ticles incorporated in the work covered by the contract are to be of the best grade of their respective kinds for the purpose (R. 24). Clearly this was an obligation placed upon the contractor and not one assumed by the United States. Section 22a of the specifications which set forth the manner in which the contractor should construct the embankment provided that the contractor should use clean earth free from all foreign matter in constructing the levee and that no earth which sloughs or shows a tendency to slough shall be placed in the embankment (R. 17-18). These also clearly are obligations which were placed upon the contractor whose duty it was to select from the material at hand, which the United States undertook to furnish, suitable material. As the court below found (R. 37), there was suitable material available for the construction of the levee, and the failure of the petitioner to select that material, not the failure of the United States to provide such material, caused petitioner's losses.

3. Petitioner's contention that the United States misrepresented the character of the soil to be encountered and the working conditions is without merit. At intervals of 1,000 feet along the base of the levee borings were taken to disclose the character of the material present (R. 55). As the court below found (R. 32) these borings were accurately charted and properly reflected the condition of the soil to be encountered. There



was no obligation on the part of the United States to take any borings at all, and having taken the borings its sole duty, which it fulfilled (R. 31), was to make available to the contractor the information which it had obtained. Moreover, there was no misrepresentation of any material facts by any failure of the Government to disclose facts of which it had notice. Whether cypress stumps would be encountered was a matter which the contractor was as capable of anticipating as the Government officials. Although there is testimony to indicate that the character of the vegetation growing on the borrow pits was sufficient to warn of the fact that there may have been an underlying cypress swamp (R. 50), other evidence would support a finding that no one could know if cypress stumps were present (R. 51). In either aspect, however, petitioner was placed upon the same notice as were the officers of the United States. The prevalence of rainfall and the fact that drainage might have to be maintained were a notorious fact which was open for all to see. It was a condition reasonably to be expected and no duty existed on the part of the government to call it to the bidder's attention. Nor was there a warranty by the United States of the working conditions which would be encountered. Only where the United States either represents itself as having knowledge which it does not possess or fails to convey information as to hidden conditions which it does possess is it held to war-

rant subsoil conditions. *Hollerbach v. United States*, 233 U. S. 165, 172; *United States v. Atlantic Dredging Co.*, 253 U. S. 1, 10-11.

Even assuming that subsoil or latent conditions existed which neither party to the contract had in contemplation, it was the duty of the contractor under Article IV of the contract (R. 23-24) to proceed with the work and seek an equitable adjustment under Article III (R. 23) for the increased costs of the work. But petitioner did not seek his remedy by the procedure thus prescribed but instead sought to rescind the contract when he became dissatisfied with working conditions (R. 36). He is not now entitled to the benefits of clauses in the contract with which he failed to comply. See *United States v. Rice and Burton*, No. 31, decided November 9, 1942.

#### CONCLUSION

The decision below is correct. We respectfully submit therefore that the petition for a writ of certiorari should be denied.

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